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LEGAL ARGUMENTS AGAINST THE SERBIAN DECENTRALIZATION PLATFORM

Legal Memorandum

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Statement of Purpose 3

Introduction 3

The Entity Structure 3

Direct Institutional Relationships with Belgrade..... 4

De Facto Partition 5

Ethnic Segregation through Territorial Delimitation 6

Vital Interest Veto 7

Extraterritoriality 8

Conclusion 9

Statement of Purpose

This memo presents legal arguments against the platform for decentralization presented by the Government of Serbia, drawing on international treaty law and international customary law as established through state practice.

Introduction

The Belgrade Platform for Decentralization (“Belgrade Platform”) calls for the establishment of a Serb Entity and a “vital interest” veto. These structures strongly resemble the minority rights institutions established in Bosnia and Herzegovina, which have since come under strong international criticism and are in the process of being revised.¹ The entity structure proposed in the Belgrade Platform has proven ineffective and inefficient in the only two European countries where it exists: Bosnia and Herzegovina and Belgium. Moreover, direct institutional links between the Serb Entity and Belgrade, as envisioned in the Belgrade Platform, violate Kosova’s sovereignty and political independence by giving Belgrade institutionalized influence over local governance within Kosova’s borders. Finally, Belgrade envisions the entity as de facto Serbian territory. This concept of extraterritoriality put forth by Serbia is an unnecessary constraint on Kosova’s independence, without any legal precedent.

The Entity Structure

The Belgrade Platform calls for municipal boundaries to be re-drawn to create new Serb-majority municipalities, in addition to Serb-Majority municipalities already existing in Kosovo.² The Belgrade Platform envisions the establishment of a Serb “Entity”³ that would be the political “framework” uniting

¹ See European Commission for Democracy through Law, *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, para. 47, March 11-12, 2005, available at [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)004-e.asp](http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.asp) [hereinafter Venice Commission].

² According to the plan, the Serb-dominated municipalities would be located in the regions of Northern Mitrovica, Central Kosova, Kosova Pomoravlje, and Metohija.

³ While the Platform provides no clear definition of this entity, it appears that it would resemble the Republika Srpska (“RS”) established in Bosnia and Herzegovina (BiH) under the Dayton Accords. However, unlike Republika Srpska, the municipalities that make up the Serb Entity in Kosova would not be territorially connected; their affiliation would be entirely political.

these municipalities⁴. Orthodox sites in Kosovo would be part of the Serb entity, even if they are not located within the territory of the Serb municipalities.⁵

The only European states that have established similar entity structures are Bosnia and Herzegovina and Belgium.⁶ In both countries, the complicated nature of the structures proved inefficient and ineffective. The division of Bosnia and Herzegovina along ethnic lines proved problematic in building a functioning, democracy because it created a weakened and decentralized state.⁷ The Venice Commission, which recommends the abolition of the entity structure, described Bosnia's entity structure as "neither rational nor efficient" in part due to the costs associated with duplicate ethnic institutions.⁸ Belgium's structure of three Communities with unique linguistic and cultural identities has also been highly criticized for being inefficient. Belgium's structure has been described as being economically unworkable due to the lack of incentives for the regions and communities to guarantee the stability of the Federation.⁹

Direct Institutional Relationships with Belgrade

The Belgrade Platform vests the municipalities with the right to establish "direct institutional links" with the Government of Serbia in the areas of cultural autonomy, healthcare, welfare, local police and judiciary, and "in some other areas."¹⁰ Neither the scope of the links nor the nature of the "other areas" is defined.

⁴ The Belgrade Platform does not define "framework."

⁵ According to the platform, these sites "would certainly include the Pec Patriarchate, the monastery of Visoki Decani, the church of Holy Mother of Ljevis, the monastery of Holy Archangels and the Devic monastery..."

⁶ Belgium is made up of three Communities: the French Community, the Flemish Community and the German-speaking Community. See Title 1, Article 2 [Communities] of the Constitution of Belgium. Bosnia and Herzegovina is made up of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska. See Article 1, Paragraph 3 of the Constitution of Bosnia and Herzegovina.

⁷ See Venice Commission, at 8. "Power is dispersed between too many levels and usually exercised by a unit too small to fulfill its functions effectively. There are too many bureaucracies and too many posts for politicians..." Venice Commission at para. 14.

⁸ The Venice Commission's report further stated: "An area of [Bosnia and Herzegovina's] size, population and economic state of development cannot afford such complicated arrangements... Under these circumstances more than 50 percent of gross domestic product ("GDP") within [Bosnia and Herzegovina] goes into financing the bureaucracy and only a smaller part into public investment or services to the inhabitants. *This is not what citizens are entitled to expect from government.*" (emphasis added)

⁹ Belgium's public debt is 130 percent of the GDP, more than any other European Country. See Gonzales D'Alcantara, "Critical Thoughts about the Present Federal and Democratic System" in *Federalism and Decentralization: Perspectives for the Transformation Process in Eastern and Central Europe* (2002), p. 175.

¹⁰ The Belgrade Platform does not specify whether the Serb Entity would also have the right to establish such institutional links.

International law provides no support for the establishment of such institutional relationships. In fact, international treaties that call for special measures to ensure the protection of minorities' linguistic, religious, and cultural rights place these guarantees squarely within the principle of States Parties' sovereignty and *political independence*.¹¹ The direct links envisioned in the Belgrade Platform would give the Government of Serbia substantial influence over local governance inside Kosova's borders, undoubtedly interfering with the exercise of Kosova's sovereignty and political independence and in contravention of international minority rights treaties.

Similarly, state practice provides no precedent for direct ties between the local governance of a minority population in one state and the government of a neighboring state. European states seeking to protect minorities through decentralization have not allowed units of local governance to engage in direct relations with foreign states without going through the central government. Instead, European states have devolved competencies over culture, language, and local economy while retaining the competency to conduct international relations exclusively with the central government.¹²

Belgium provides an exception to this general rule. The Belgian Constitution vests treaty-making power in its constituent regions and communities. However, this structure has been criticized as threatening the consistency and efficiency of Belgian foreign affairs positions.¹³ Similarly, institutional links between Belgrade and units of local governance in Kosova would vest those units with the capacity to engage in international relations and would impede Kosova's ability to develop politically consistent foreign affairs policies.

De Facto Partition

¹¹ "Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States." Section III, Article 21 of the Framework Convention for the Protection of National Minorities (1995), Council of Europe, ETS No. 157 (*available at* <http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm>). See also Part 1, Article 5 of the European Charter for Regional or Minority Languages (1992), Council of Europe, ETS No. 148 and the United Nations Charter.

¹² For example, Spain has devolved significant authority to "Autonomous Communities" (communities of bordering provinces with common historical, cultural, and economic characteristics). See Chapter III, Article 148 of the Constitution of Spain. However, those competencies remain distinctly local, and the State retains competence over international relations, "external health," and "the regulation of the basic conditions which guarantee the equality of all Spaniards in the exercise of their rights." See Chapter III, Article 149 of the Constitution of Spain. See also Article 117(2)(a) of the Constitution of Italy and Chapter 2, Section 1, Article 54 of the Constitution of Switzerland.

¹³ See Gonzales D'Alcantara, "Critical Thoughts about the Present Federal and Democratic System," *Federalism and Decentralization: Perspectives for the Transformation Process in Eastern and Central Europe* (2002), p. 175.

The Belgrade Platform calls for municipal boundaries to be re-drawn to create four Serb-majority regions, which would be politically united under a single Serb Entity. In light of the undefined nature of these direct institutional links with Belgrade, subdividing Kosova along ethnic boundaries would be tantamount to de facto partition. As discussed below, the entity structure grants Belgrade extraterritorial control over territory within Kosova's borders.

In his report to the United Nations Secretary General on the situation in Kosova, Kai Eide made it clear that any decentralization solution for Kosova must not in any way mean partition, but instead should "promote integration of minorities in a wider Kosova framework."¹⁴

The Belgrade Platform makes no provision for the integration of minorities into Kosova political institutions. Rather, the intentional creation of Serb-majority municipalities, as the Belgrade Platform envisions, would discourage such integration. Institutional links between Serb municipalities and Belgrade would ensure that political loyalties are divided between the central Kosovar Government and the Government of Serbia.

The Belgrade Platform does not create incentives for the Serb-majority municipalities to cooperate with the central Kosovar Government, but does create significant incentives for those municipalities to cooperate with Belgrade. This division of Serb-majority municipalities with direct dependence on Belgrade and no integration into a wider political framework within Kosova is de facto partition.

Ethnic Segregation through Territorial Delimitation

Dividing municipalities along ethnic lines reinforces ethnic divisions in contravention of international human rights law.¹⁵ In reference to the Republika Srpska, the Constitutional Court of Bosnia held in the "Constituent Peoples" Case:

¹⁴ Kai Eide, Ambassador of Norway to NATO, *The Situation in Kosova: Summary and Recommendations to the UN Secretary General*, August 20, 2004, para. 26. Mr. Soren Jessen-Petersen, Special Representative of the Secretary General to Kosova, also emphasized the importance of avoiding partition in a January 12, 2006 press conference, stating: "If entities in any way smell like partition, then that is not on the agenda. It is absolutely clear that partition of Kosova is not on the agenda."

¹⁵ "[T]he United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith..." Preamble to the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (1963), available at <http://www.unhcr.ch/html/menu3/b/9.htm>. The European Charter for Regional and Minority Languages and the Framework Convention for the Protection of National Minorities call for State Parties to promote a spirit of tolerance and intercultural dialogue, which would be significantly undermined by the Belgrade Platform's proposed segregation. See Section II, Article 6 of the Framework Convention for the Protection of National Minorities (1995) and Part II, Article 7(3) of the European Charter for Regional or Minority Languages (1992).

*It must be concluded from the texts and underlying spirit of the International Convention on the Elimination of All Forms of Racial Discrimination, the European Charter for Regional and Minority Languages and the Framework Convention for the Protection of National Minorities that not only in national states, but also in the context of a multi-national state such as [Bosnia and Herzegovina] the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation.*¹⁶

The Court further stated, "It is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society."¹⁷

Given that the entity structure in Bosnia and Herzegovina appears to have been the basis for the Belgrade Platform, the criticisms of that ethnic segregation resulting from that structure apply equally to the Belgrade Platform. In its Opinion on the Constitutional Situation in Bosnia and Herzegovina, the Venice Commission held: "[T]he present structure of the State is largely based on the ethnic principle and maintaining it risks reproducing and reinforcing the ethnic divisions."

Vital Interest Veto

The Belgrade Platform allows ethnic-Serbian members of the Kosova Assembly to block any decision or provincial law that concern the "vital interests" of the "Serb Community."¹⁸ The Belgrade Platform does not define either the "Serb Community" or the "vital interests" to be protected.

Such broad authority has paralyzed other governments. The vital interest veto created deadlock in Bosnia and Herzegovina's Parliament and other state level government institutions. The Venice Commission attributed the deadlock in Bosnia and Herzegovina's Parliament to the fact that "vital interests" were not limited or defined.

¹⁶ See the Constituent Peoples' Decision of the Bosnia and Herzegovina Constitutional Court, Thursday, September 14, 2000, para. 57, partial decision available http://www.ohr.int/ohr-dept/legal/const/default.asp?content_id=5853.

¹⁷ Id.

¹⁸ The Platform states specifically: "The constitutional and legal positions of the Serb community in Kosova must be defined in a way that will not grant the Albanian majority any constitutional and legal grounds to treat the K-Serbs (sic) as a minority to which they can impose solutions opposed to the K-Serb vital interests."

In the hands of a loosely defined Serbian entity with special institutional links with Belgrade, such a veto would allow the Government of Serbia to exercise undue influence in Kosova's political affairs. The undefined nature of the vital interest veto in Bosnia and Herzegovina demonstrated that a minority population can paralyze the legislature, as nearly any issue can be counted among a minority's vital interests. Unlike the situation in Bosnia and Herzegovina, however, the minority population exercising the vital interest veto in Kosova would have direct ties to Belgrade. Such influence would violate Kosova's political independence as protected in the United Nations Charter and other international treaties.¹⁹

Extraterritoriality

The establishment of the Serb controlled entity in Kosova would grant Serbia the authority to control territorial areas within Kosova. This concept, known as extraterritoriality, refers to the application of one country's laws within the jurisdiction of another country.

It is a universally accepted axiom of modern international law that every independent and sovereign²⁰ state possesses absolute and exclusive jurisdiction over all persons and things, native or foreign, within its territorial limits, regardless of nationality.²¹ While there are practical and legal limitations on absolute State authority, these are exceptions to the sovereignty principle and not independent rights in and of themselves. The most notable of these exceptions is the system of "extraterritoriality."

As international law has developed, the system of extraterritoriality has declined. States now view extraterritoriality, which once had been a normal practice, as a distinct limitation and derogation of State sovereignty. A second decisive factor in the decline of extraterritoriality was the inherent defectiveness and propensity for abuse in the system itself. The institution of extraterritoriality is inferior to the sole jurisdiction of the territorial sovereign. The third and perhaps most important factor contributing to the decline of extraterritoriality is the overall improvement of judicial systems on both the State and international level. Since

¹⁹ See the United Nations Charter, Section III, Article 21 of the Framework Convention for the Protection of National Minorities (1995), Council of Europe, ETS No. 157; and Part 1, Article 5 of the European Charter for Regional or Minority Languages (1992), Council of Europe, ETS No. 148, *supra* note 6.

²⁰ While sovereignty has many meanings, in its most common modern usage it is the term for the totality of international rights and duties recognized by international law as residing in the independent territorial unit of the State. (James Crawford, *id.*)

²¹ Shih Shun Liu, *Extraterritoriality*, Columbia University, 1925. Michael Akehurst, *Jurisdiction in International Law*, 46 British Year Book of International Law 1, 1972-1973.

extraterritoriality has always been invoked in response to concerns over legal jurisdiction, as judicial systems improved the need for extraterritoriality declined.

The strongest argument against *de jure* Serbian territory in Kosova is that the grant of extraterritorial privilege has never included a *de jure* or *de facto* grant of territory to a foreign power. Before territorial sovereignty was even conceived of, extraterritoriality has been understood as the mere application of another country's laws within the borders of the host country, by the permission of the host country. There is no historical or legal precedent for the creation of *de jure* foreign territories within the borders of a separate sovereign State.

Conclusion

The Belgrade Platform contravenes international law and established state practice with regard to minority rights protections. The entity structure proposed in the Belgrade Platform proved ineffective and inefficient in the two European states where it has been implemented. The direct institutional links between Belgrade and the Serb-majority municipalities inside Kosova violate Kosova's political independence. The entity structure, when combined with the proposed links with Belgrade, creates the opportunity for Belgrade to exercise unchecked influence in Kosova's local governance, further violating Kosova's political independence. This influence could be deepened still further through the implementation of the proposed "vital interest" veto, allowing Kosova Serb populations under Belgrade's influence to veto decisions of the Kosova Assembly under circumstances not clearly defined nor delimited. Finally, the extraterritorial proposition put forth by Serbia is an outdated privilege which is limited by, and is an exception to, the international legal cornerstone of territorial sovereignty.